Supreme Court, U.S.
FILED

No. _____

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In The Supreme Court of the United States

October Term 1997

STEPHEN E. DARLING;
RHONDA RENE DARLING,
Petitioners,

v.

SAVERS LIFE INSURANCE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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48 pp

QUESTIONS PRESENTED

1. Has the Court of Appeals seriously violated public policy on the issue of unreasonable delay in voiding the health insurance policy issued to the Darlings when the insurance company waited eight months before rescinding their policy and the Petitioners had amassed over $100,000 in medical bills (which the Respondent sanctioned)?

2. The Court of Appeals has endorsed the District Court's departure from the well-established and widespread precedents and standards for Summary Judgment in this country. In doing so, has the Court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision to correct the Order of Summary Judgment when material facts in dispute remain?

3. Did the Circuit Court and the U.S. Court of Appeals misinterpret S.C. Code Ann. Sec. 38-71-40, by ruling that there was misrepresentation by Petitioners, that the alleged misrepresentation was material and should have voided the entire policy?

4. Did the U.S. Court of Appeals err in ruling the policy was indivisible, that Savers Life could have insured one applicant without insuring the other, even though testimony of Savers Life's own underwriter was that the policy was divisible if one applicant was found not to be insurable?

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PETITION FOR A WRIT OF CERTIORARI

Stephen Darling and Rhonda Rene Darling respectfully seek a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit which affirmed a Summary Judgment Order issued by the United States District Court for the District of South Carolina on January 21, 1997.

OPINIONS BELOW

The opinion of the Court of Appeals (A.1)[1] is reported at 131 F.3d 388 (4th Cir. S.C., Dec 15, 1997) (No. 97-1429). The District Court Order in accordance with its opinion (A.17) is unreported. The Order of the District Court denying reconsideration (A.31) is not officially reported. The Order of the Court of Appeals (A.16) denying rehearing is not officially reported.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED IN THE CASE

The falsity of any statement in the application for any policy covered by this chapter does not bar the right to recovery thereunder unless the false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer. South Carolina Code Ann. Sec. 38-71-40.

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[1] "A." references are to the Appendix which is bound in this volume.

STATEMENT OF THE CASE

Petitioners Stephen and Rhonda Darling were issued a health insurance contract by Defendant Savers Life Insurance Company which was rescinded eight months after issue. The Darlings allege breach of contract of insurance and bad faith refusal to pay benefits. Respondents allege false statements, misrepresentations, intent to deceive and fraud on the part of the Darlings.

The Complaint contains detailed factual allegations and two claims for relief: 1) breach of contract of insurance and 2) bad faith refusal to pay benefits. On September 24, 1993, Savers Life agent met with Stephen Darling at Mr. Darling's place of employment to complete an application for major medical health insurance for Mr. Darling and his wife, Rhonda. The agent himself completed the application in a hasty, cursory manner. At no time did the agent meet with Mrs. Darling, nor did Mrs. Darling personally sign the application. Neither Mr. or Mrs. Darling was asked to read the application nor did the agent stress that the application was anything very important at all. As their testimony bears out, the Darlings had no conception of the import of an application and were not so advised. On October 2, 1993, a part time employee of Savers Life phoned Mrs. Darling at home to ask various questions regarding medical conditions. Testimony differs as to the content of that conversation. On October 8, 1993, Savers issued its policy to the Darlings.

During the next several months, Mrs. Darling sought medical treatment for several ailments of unknown etiology and was hospitalized on more than one occasion in an attempt to determine the nature of her underlying problem. She was finally properly diagnosed after the period of aggressive testing and trial treatments. That period of multiple doctor visits and hospital admissions fell within the eight-month period following the issuance of Savers policy and its rescission of the policy on June 6, 1994. Savers

based their rescission of the policy on allegations of pre-existing conditions not contained in the application.

REASONS FOR GRANTING THE WRIT

There is a plethora of conflicting cases on the effect of an insurer's delay in acting on an application for health insurance and this Court should grant Writ on that issue alone although there are other conflicts which would justify granting the Writ.

What Savers has done to the Darlings is unconscionable: by their eight month silence, they allowed and even encouraged the Darlings' assumption of financial obligations only to underwrite after claims were made and rescind the policy. Underwriting at the time claims are made has become a disturbing trend in the health insurance industry, an industry which has been catapulted to the forefront recently due to its widespread failure to pay claims for which it contracts to pay.

The Darlings had amassed almost $100,000.00 in medical bills which Savers refused to pay. The Darlings relied on that policy to pay their medical bills. The Darlings have been ruined financially and emotionally and they are refused medical treatment and cannot obtain health insurance.

ARGUMENT

Savers was certainly aware there might be an underwriting "red flag" when Mrs. Darling submitted numerous claims beginning just after the policy was issued, yet they did nothing. The policy was issued on October 8, 1993. Ms. Darling sought treatment as soon as November 19, 1993. Savers never even requested a simple, low-cost Physician's Statement until March 11, 1994. If both parties to a contract act as if a contract exists, the actions of the

parties affirm the existence of a contract. Savers cannot act as if a contract exists for eight months and accept premiums for that policy, then decide to underwrite several months down the road and finally, to rescind the contract.

Mr. and Mrs. Darling are not sophisticated consumers. Mr. Darling works for a heating and air conditioning company and Mrs. Darling cleans houses part time for extra money. The financial ruin Savers has caused them runs deeper than the $100,000 they owe medical providers. It runs deeper than the fact they are denied medical treatment now. It runs deeper than the fact they cannot obtain health insurance. It runs deeper than the legal collection actions pending against them for those bills. The acts of Savers Life in allowing this situation to escalate and become the elephant in the Darlings' life has caused the end of their marriage and caused them to compromise their children's health due to lack of money and no health insurance. In short, it has ruined their lives.

Mr. and Mrs. Darling maintain the Court of Appeals failed to properly consider the standard for Summary Judgment as they will argue herein, but this case cries out for the highest court in the land to take a hard look at the deplorable bad faith practice by Savers and other insurers. If Savers had underwritten this claim when they should have and advised the Darlings that they were uninsurable, the young couple's financial ruin may have been prevented. There are too many thin arguments propounded by Savers in this case that they claim justify rescission of the policy. There are too many factual issues and conflicting laws which do justify overruling the Court of Appeals and remanding the case for a jury trial.

The Court of Appeals, in their opinion, did not address the delay in underwriting this risk as they should have. Savers relied on Mr. Darling's answers to questions on the application in accepting the risk. Gordon Rose, the Darlings' expert, stated this is bad underwriting practice and

the standard in the industry is not to rely on the application to underwrite a risk. Savers should have considered the application as a starting place for underwriting and should have then obtained Attending Physicians' Statements, an inspection report and a medical exam, Mr. Rose testified. Savers did not order the first Attending Physicians' Statement until five months after the policy was issued. The Medical Inspection Bureau reports applications for insurance to other companies and lists conditions and diseases, Mr. Rose stated. Obtaining that report would have been a minimal expense to Savers.

The Court of Appeals relied on Atlantic Life Ins. Co. v. Hoefer, 66 F.2d 464 (4th Cir. 1933) in determining the materiality of the information given on the application:

> Information is material when a reasonable **person** (emphasis added) would regard it as likely to affect the insurance company's assessment of the risk and thus its decision whether - and in what terms - it is willing to provide coverage.
>
> The conflict:
>
> The standard by which materiality is determined is based on the insurance industry in general and what action a reasonable **underwriter** (emphasis added) would have taken under the circumstances, in accordance with its usual practice, had the truth been known. Berber v. Minnesota Mutual Life Ins. Co., 38 Utah Adv. Rep 10, 723 P.2d 388 (1986).

- It follows that the Court of Appeals should have given more credence to the testimony of Plaintiffs' expert Gordon Rose, an underwriting expert, and less credence on the "reasonable person" argument.

> Accordingly, the test is not what a particular company would have done. Rather, it concerns the usual custom of insurers underwriting similar risks. The question turns on whether careful and intelligent (underwriters) would have regarded the fact misstated as substantially increasing the chance that the event insured against would happen, and thus either would have rejected the application or would have accepted the risk only on additional conditions. 7 Couch on Insurance 2d, Sec. 35:81 (rev 1985).

Case law does not favor the absolute reliance on the insurance carrier's employee to provide testimony as to the materiality of the risk.

> There has been perceived a conflict of authority on whether officers or employees of an insurer should be permitted to testify that a certain risk would not have been insured but for the applicant's misstatements in the insurance application. King v. Ohio Valley Fire & Marine Ins. Co., (1926) 212 KY 770, 280 SW 127.

The Darlings maintain Savers' underwriting guidelines and the testimony of their employee, Thomas Gullett, should have been considered as a part of the whole, but that expert Gordon Rose's testimony as to the bad

practice of underwriting at the time claims are made should have been given greater weight by the lower court. At the very least, it is clear a jury question arises.

There is support for the proposition that an unreasonable delay in passing upon an application for insurance, as such, gives rise to a presumption or inference of acceptance, so as to permit an action on the contract. 43 AmJur Ins, Sec. 205; Pickett v. German Fire Ins. Co., 39 Kan 697, 18 P. 903; Ryan v. Security Industrial Ins. Co. (La App), 386 So.2d 959. The Darlings argued this in the courts below. What constitutes an unreasonable delay is generally for the trier of fact. 43 AmJur Ins, Sec. 205, supra. Additionally, an insurer who undertakes to issue a policy owes a duty to the proposed insured to act with reasonable time and cannot remain silent on the status of the application for months. State Farm Life Ins. Co. v. Bass (1992), Fla App D3, 605 So.2d 908, 17 FLW D 2101.

The Court of Appeals contends (A.1, p.6) that Mr. Darling misrepresented his health history on the insurance application "by failing to disclose that he had recently suffered a bulging cervical disk". This alone, the justices ruled, would void the policy. Mr. Darling did incorrectly answer the question related to back and spinal problems but said in his deposition that he thought it would not matter since those bills were taken care of by his company's workers' compensation carrier. Also, Mr. Darling was confused and he did not consider his back condition as a disease or a disorder, as the application asked, and thought that it was neither, but was an injury. The application did not ask whether or not he had an injury to his back. The Darlings' insurance expert, Mr. Rose, who reviewed all the documents and facts of this case, testified Mr. Darling answered the questions accurately in his application.

The Darlings agree that he should have told the agent about his injury. "The record clearly reflects that this misrepresentation was material to Savers Life's assumption

of the risk of insuring Mr. Darling," the Court of Appeals opined, as is required by South Carolina Code Ann. Sec. 38-71-40, for a policy to be rescinded. They contend that since Mr. Darling's alleged material misrepresentation alone would be sufficient grounds for Savers to rescind the policy, it is not really necessary to look at each and every complaint and doctor visit by Mrs. Darling since the policy is not severable. (A.1, p.8) The Darlings argued orally before the Court of Appeals that there are "two cases" before the Court and Mr. Darling's misrepresentation is irrelevant to whether Mrs. Darling was entitled to continuing coverage from Savers Life. Id. The Court found no basis for that contention. Id. However, Savers' underwriter, Thomas Gullett, testified in his deposition as follows:

> Q Under your underwriting requirements, can you disqualify like a member of a family but still insure the rest of the family?
>
> A Yes.
>
> Q Can you disqualify one spouse and insure the other spouse?
>
> A Yes.
>
> Q So in regards to Rhonda and Steve Darling being insured, their insurability was not contingent on each other in this particular case?
>
> A That's correct.
> (Depo. of Thomas Edward Gullett, October 6, 1995, p. 54, l.5-16)

This issue is in conflict with the testimony and therefore precludes summary judgment. Summary judgment should be granted only where it is "perfectly clear" that no genuine issue of material fact exists and an inquiry into the facts is not desirable to clarify the application of the law." Bates v. City of Columbia, 301 S.C. 320, 391 S.E.2d 301(1990).

The lower Court has bound Mrs. Darling to alleged misrepresentations she made in a telephone interview a few days after the application was completed.

> We agree with the district court's conclusion that no genuine factual dispute exists as to the Darlings' material misrepresentations about Mrs. Darling's history of chest pain and Mrs. Darling's treatment for dyspnea. The remaining factual disputes about many of Mrs. Darling's alleged misrepresentations (in the interview) are therefore irrelevant and do not preclude summary judgment because the latter two misrepresentations justified Savers Life's rescission of the policy, the Court stated.

In Guy v. Commonwealth Life Ins. Co., 698 F.Supp. 1305 (U.S.Dist. Ct, N.D. Miss, (1988), the court ruled that a health insurer was not entitled to rescind policy on ground of material misrepresentation, under Mississippi law, where . . . . Mississippi statute prevented her from being bound by any misrepresentations in telephone interview, because telephone questionnaire was not attached to the policy, even though application, filled out by insurer's agent, contained no answers to some of the health questions.

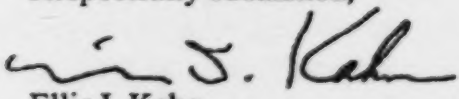
In their opinion, the Court conceded that whether Mrs. Darling was ever definitively diagnosed with thyroiditis would be a jury question. (A.1, p.10) They conceded Mrs.

Darling's diarrhea and rectal bleeding constitute "diseases" that the Darlings should have disclosed on their application would be a jury question. Id. There are too many concessions contained in the opinion that point to the necessity of a jury trial.

CONCLUSION

The manner in which the Darlings were treated by Savers Life is appalling and a distressing violation of public policy. The lower courts have varied from the well-established standards for summary judgment. The lower courts have failed to even address the eight month delay in voiding the policy. The lower courts should have been horrified that Savers Life sanctioned the Darlings' accumulation of $100,000 in medical bills. The lower courts failed to properly apply S.C. Code Sec. 38-71-40 to the facts of this case. Finally, the Darlings are entitled to a jury to sort through the facts in this case.

Respectfully submitted,



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Appendix to Petition for Writ of Certiorari

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STEPHEN E. DARLING;
RHONDA RENE DARLING,
Plaintiffs-Appellants,

v.

SAVERS LIFE INSURANCE COMPANY,
Defendant-Appellee,

and

AMERICAN HEALTH UNDERWRITERS,
INCORPORATED,
Defendant.

No. 97-1429

Appeal from the United States District Court
for the District of South Carolina, at Charleston.
Patrick Michael Duffy, District Judge.

(CA-94-2452-2-23)

Argued: October 1, 1997
Decided: December 15, 1997
Entered: December 15, 1997

Before WILKINSON, Chief Judge, and WILKINS and LUTTIG, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Eric James Davidson, DROSE, DAVIDSON & BENNETT, Charleston, South Carolina, for Appellants. Harry Lee Davis, DAVIS & HAMRICK, L.L.P., Winston-Salem, North Carolina, for Appellee. **ON BRIEF:** Danny H. Mullis, HOLMES & THOMSON, Charleston, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Appellee, Savers Life, entered into a contract to provide health insurance to Stephen Darling and his wife, Rhonda Darling. The application for insurance, on which the contract was based, was completed by Michael O. Benke, an insurance salesman,[1] in consultation with Stephen Darling on September 24, 1993. See J.A. at 123, 144. Rhonda Darling was not present during the meeting between her husband and Benke, but Stephen Darling spoke with her on the telephone to obtain information for the application. See id. at 112-13, 145. Stephen Darling signed the application for himself; at Benke's urging, Rhonda Darling authorized Stephen Darling's mother, Erica Darling, to sign the application on

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[1] Mr. Benke operated an insurance agency known as Business Management Consultants and was a sub-agent of American Health Underwriters (formerly known as Savers Health Underwriters). American Health Underwriters is not corporately related to appellee, Savers Life. See J.A. at 105-108, 141. In accordance with South Carolina law, Benke was licensed to submit applications for insurance to Savers Life through American Health Underwriters. See id. at 105-108, 141-143.

Rhonda Darling's behalf and Erica Darling did so. See id. at 126, 146. The Application states that the insureds "agree that the falsity of any answer or statement in this Application may bar the right to recover thereunder if such answer materially affects the acceptance of the risk or hazard assumed by the Company." Id. at 54. On or about October 2, 1993, a Savers Life employee, Norma Long, conducted a telephone interview with Ronda Darling to follow upon the information contained in the application. Id. at 172-176.

Based on the information provided both in the application and during the telephone interview with Mrs. Darling, Savers Life issued a Certificate of Insurance ("Certificate") to the Darlings, effective October 8, 1993. See id. at 57, 80. The application was attached to and made a part of the Certificate. The Certificate states:

> Please read the copy of the Application attached to this Certificate. Carefully check the application to be sure all information is correct. If you find errors or if any past medical history has been left out of the Application, contact us at 8064 North Point Boulevard, Winston-Salem, North Carolina 27106, immediately. This Application is part of the Certificate, and the Certificate was issued on the basis that the answers to all questions and the information shown on the Application was correct and complete.

Id. at 58. The Darlings did not report any inaccuracies or omissions in the information on the Application.

In conjunction with subsequent claims submitted to Savers Life by the Darlings' medical providers, Savers Life obtained certain historical medical records for the Darlings. See id. at 73-75, 154-59. Savers Life claimed that the information in those medical records differed from that provided by the Darlings in the application and during the

telephone interview, and that the Darlings would not have qualified for coverage if they had provided accurate, complete medical histories to Savers Life. Relying on the language of the Application that allows Savers Life to void the policy for material misrepresentations by the insureds, and on South Carolina Code § 38-71-40[2] -- which also allows an insurer to avoid liability when the insureds made material misrepresentations -- Savers Life refunded the Darlings' premium and declared the Certificate void ab initio. See J.A. at 22-23, 162. Savers Life thus refused to pay the Darlings' claims.

The Darlings then initiated this suit, alleging that Savers Life had breached the insurance contract and had, in bad faith, refused to make payments under the contract. The district court found that the Darlings had made numerous material misrepresentations in the information they provided to Savers Life. The district court summarized the discrepancies as follows:

> 1. The Application indicates that neither Mr. nor Mrs. Darling suffered from any neck, back, spine or hip disease or disorder (Question 9(o)). The medical history reveals that Mr. Darling was diagnosed with a bulging cervical disk on August 26, 1993, and received physical therapy for this condition as late as September 10, 1993.

---

[2] Specifically, South Carolina Code Ann. § 38-71-40 provides:

> The falsity of any statement in the application for any policy covered by this chapter does not bar the right to recovery thereunder unless the false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer.

Id. (emphasis added).

2. The Application indicates that neither Mr. nor Mrs. Darling had ever suffered from any disease of the thyroid (Question 9(n)). The medical history reveals that Mrs. Darling was diagnosed with thyroiditis on July 9, 1991.

3. The Application indicates that neither Mr. nor Mrs. Darling ever received treatment for dyspnea (Question 16). The medical history of Mrs. Darling establishes that she was treated for dyspnea in December 1988, January 1992, and March 1992.

4. The Application indicates that neither Mr. nor Mrs. Darling had ever suffered from chest pains (Question 9(b)) or anxiety (Question 9(s)). The medical history reveals that Mrs. Darling had been treated for chest pains on two occasions and anxiety on two occasions.

5. The Application indicates that Mrs. Darling never had any disease or disorder of her reproductive organs (Question 10(b)) and never had a caesarian section (Question 10(f)). Mrs. Darling's medical history reveals a history of ovarian cysts and three caesarian sections.

6. The Application indicates that neither Mr. nor Mrs. Darling had ever suffered from any diseases of the gall bladder (Question 9(j)). Mrs. Darling's medical history reveals that she had surgery for the removal of her gall bladder.

7. The Application indicates that neither Mr. nor Mrs. Darling had ever suffered from any

> disease of the rectum, esophagus, or intestines (Questions 9(j) and 9(h)). The medical history reveals that Mrs. Darling had been treated for diarrhea and rectal bleeding and had undergone a colonoscopy.

J.A. at 204-205.

Based on these findings, the district court determined that Savers Life was entitled to rescind the Darlings' insurance policy for material misrepresentations pursuant to the contractual language of the policy and to South Carolina Code § 38-71-40.[3] The district court granted summary judgment to Savers Life, and this appeal followed.

Although we disagree with the district court's implicit finding that there were no disputed factual issues about any of the alleged misrepresentations that it enumerated, we believe that no genuine factual dispute exists as to the Darlings' material misrepresentations about Mr. Darling's bulging cervical disk, Mrs. Darling's history of chest pain, and Mrs. Darling's treatment for dyspnea, and that those misrepresentations were sufficient grounds for Savers Life to rescind its contract with the Darlings. Consequently, we affirm the district court's grant of summary judgment for Savers Life.

---

[3] The district court did not decide whether the insurance salesman, Benke, served as the legal agent of the Darlings or of Savers Life, although the court noted that, under the applicable legal standard, Benke appeared to be the legal agent of the Darlings. See J.A. at 200. It was not necessary to resolve this agency question because even if Mr. Benke was acting as an agent of Savers Life, that fact would not obviate the Darlings' responsibility for any misrepresentations in the application. See Parnell v. United Insurance Co., 142 S.E.2d 204 (S.C. 1965) (allowing insurer to rescind the policy based on material misstatements in the plaintiff's application, even though the plaintiff alleged that the insurance company's agent had inserted false answers in her application without her knowledge and that she had signed the application without reading it).

There is no dispute that Mr. Darling misrepresented his health history on the insurance application by failing to disclose that he had recently suffered a bulging cervical disk. Indeed, at oral argument, the Darlings' counsel conceded that Mr. Darling incorrectly answered the application question that inquired whether the applicants had ever suffered "any Neck, Back, Spine or Hip Disease or Disorder?", J.A. at 53, and that Mr. Darling should have told Savers Life about his bulging cervical disk. The record confirms that Mr. Darling was diagnosed with a bulging cervical disk through an MRI study on August 26, 1993, see id. at 56, and that he received physical therapy for this cervical disk condition as late as September 10, 1993-- just two weeks prior to the date of his application for Savers Life insurance, see id. at 154-56.

Moreover, the record clearly reflects that this misrepresentation was material to Savers Life's assumption of the risk of insuring Mr. Darling. Thomas E. Gullett, who made the decision to issue the Certificate of Insurance to the Darlings in his capacity as Director of Major Medical and Chief Underwriter for Savers Life, testified in his deposition that Mr. Darling's bulging cervical disk was "material to the risk undertaken by Savers Life in underwriting[that] Certificate" and that "the Certificate would not have been issued had that injury and diagnosis been disclosed to Savers Life." Id. at 82. Gullett also testified that Savers Life relies solely upon the Health Underwriters' Guide issued by the American United Life Insurance Company as its underwriting guidelines, see id. at 81; pursuant to those guidelines, back problems of the sort suffered by Mr. Darling would require at least that a rider attach to the policy, excluding coverage for that condition, see id. at 95.

The Darlings assert that Savers Life actually published its own underwriting guide and failed to disclose that fact to the Darlings. See Appellants' Brief at 6. Consequently, the Darlings have submitted an attachment to their brief that contains underwriting guidelines -- on Savers Life letterhead -- which indicate that they are effective as of

October 1, 1992. See Appellant's Attachment to Brief [hereinafter, "A.T.B."] at 1. This underwriting manual apparently was not submitted to the district court. Whether the guidelines in the Attachment to Brief are those actually relied on by Savers Life, however, is of no significance because those guidelines also prescribe that a rider should attach for back strain suffered within one year of application. See A.T.B. at 2.

The Darlings argue that the fact that the guidelines merely prescribe that a rider should attach indicates that their misrepresentation was not material because it would not have precluded their ultimate insurability. Ultimate insurability alone is not the test of materiality, however. If a condition would preclude ultimate insurability then it is certainly material, but a condition is not immaterial simply because the applicants might still be insurable under some hypothetical set of policy terms. Instead, information is material when a reasonable person would regard it as likely to affect the insurance company's assessment of the risk and thus its decision whether -- and on what terms -- it is willing to provide coverage. See Atlantic Life Ins. Co. v. Hoefer, 66 F.2d 464, 466 (4th Cir. 1933) (holding that a "representation is material when reasonably careful and intelligent men would regard the fact involved as substantially increasing the chances of the loss insured against; and that this is especially true when the insurer, on becoming aware of the fact, would raise the rates or reject the risk altogether"); Southern Farm Bureau Casualty Ins. Co. v. Ausborn, 155 S.E.2d 902, 908 (S.C. 1967) (holding that a "representation is material when the insured knows or has reason to believe that it will likely affect the decision of the insurance company as to the making of the contract of insurance or as to its terms ") (emphasis added).

Thus, the fact that a rider would be required under either set of guidelines confirms, rather than negates, a finding that Mr. Darling's back condition was material, because it demonstrates that the condition was significant

enough to the insurance company's assessment of the risk insuring him would pose that it would automatically alter the extent of the coverage the insurance company was willing to extend to him. Even the Darlings' own expert, Gordon K. Rose, indicated in his deposition that if an applicant for health insurance had a history within a month prior to the application of a cervical disk bulge, the insurance company would probably postpone the application and require a full medical examination by the doctor that does medical exams for the insurance company. See J.A. at 197. Presumably such an examination would be necessary precisely so that the company could effectively evaluate the impact that condition would have on the risk it was considering assuming.

Mr. Darling's material misrepresentation alone would be sufficient grounds for Savers Life to rescind its contract with the Darlings. At oral argument, however, the Darlings' counsel contended that there are "two cases" before this Court, and that Mr. Darling's misrepresentation is irrelevant to whether Mrs. Darling was entitled to continuing coverage from Savers Life. We find no basis for this contention. Counsel's argument implies the existence of two separate contracts, one between Mr. Darling and Savers Life and one between Mrs. Darling and Savers Life. The Darlings, however, completed only one insurance application, were issued only one insurance certificate, and entered into only one contract with Savers Life. See, e.g., id. at 53; id. at 57. In fact, Mr. Darling was the policyholder or "the Insured" under the Savers Life policy. See Application, J.A. at 53 (listing Mr. Darling as the "applicant" and Mrs. Darling as the spouse of the applicant); Certificate, J.A. at 61 (explaining that the "covered persons" under the policy are "the Insured" and the insured's "spouse and . . . unmarried, dependent children who are under the age of twenty-three, named on application attached to this certificate"). Thus, it appears that not only were Mr. and Mrs. Darling jointly, rather than sepa-

rately, insured by Savers Life, but also that Mrs. Darling's coverage was, in some sense, derivative of Mr. Darling's coverage.

The only South Carolina case that even arguably supports the Darlings' position is Johnson v. South State Ins. Co., 341 S.E.2d 793 (S.C. 1986). In Johnson, the South Carolina Supreme Court held that an insured's fraud as to one portion of the claim he submitted to his insurer did not bar his recovery for that part of the claim that was not fraudulent, id. at 793, even though the plain language of the contract specifically provided that "th[e] entire policy shall be void if, whether before or after a loss, the insured has wilfully concealed or misrepresented any material fact or circumstance concerning this insurance or the subject thereof . . . or in case of any fraud or false swearing by the insured relating thereto," see Johnson v. South State Insurance Co., 332 S.E.2d 778, 778 (S.C. Ct. App.) (quoting the insurance contract at issue), rev'd on other grounds, Johnson, 341 S.E.2d at 794. In so holding, the South Carolina Supreme Court cited with approval the language of Kerr v. State Farm Fire & Casualty Co., 552 F. Supp. 992 (D.S.C. 1982), aff'd in part, rev'd in part on other grounds, 731 F.2d 227 (4th Cir. 1984), that "fraud will only void provisions tainted by the fraud." See Johnson, 341 S.E.2d at 794.

One might argue by analogy that Mr. Darling's misrepresentation taints only those provisions of the Savers Life policy that provide coverage to Mr. Darling and that his coverage should thus be severed from Mrs. Darling's coverage. However, this same logic would also suggest that Mr. Darling's misrepresentation about his back condition should only taint those provisions of the policy that provide coverage for that condition -- or, in other words, that the insurer must prove that there is a causal link between the misrepresentation and the claim that it is refusing to pay. But the South Carolina Supreme Court has, since Johnson, specifically rejected the requirement of a causal link in the context of life insurance policies. See Carroll v. Jackson

Nat'l Life Ins. Co., 414 S.E.2d 777, 778 (S.C. 1992). The court held in Carroll that an alleged material misrepresentation in an application for life insurance need not be causally connected to the death of the insured for the insurance company to void the policy and refuse payment. See id. Moreover, the court also indicated, more generally, that "[t]he majority rule is that there is no requirement that the loss be causally related to the material misrepresentation under a void insurance policy," see id., and narrowed Johnson by indicating that its requirement of a causal connection applies when construing an exclusion in a valid policy rather than when determining whether a policy can be voided for material misrepresentation, see id. n.1. Consequently, it seems very unlikely that the South Carolina Supreme Court would hold that Mr. Darling's coverage was severable from Mrs. Darling's coverage and thus that Mr. Darling's misrepresentation would not void Mrs. Darling's coverage. Counsel's bald assertion that there are two cases before us -- coming on the heels of his concession that Mr. Darling did not and should have disclosed his back condition to Savers Life -- appears to be little more than a last ditch attempt to salvage at least part of the case for his clients.

In any event, the information the Darlings provided in the application and subsequent telephone interview materially misrepresented not only Mr. Darling's medical history, but Mrs. Darling's medical history, as well. Although we disagree with the district court's finding that Mrs. Darling has raised no issue of fact as to whether she inaccurately represented her medical history by failing to disclose, inter alia, that she had had thyroiditis, caesarian sections, ovarian cysts, gall bladder surgery, and diarrhea and rectal bleeding,[4]

[4] We believe that the Darlings, in fact, demonstrated the existence of a factual dispute as to each of these issues. For example, Savers Life contended, and the district court found, that Mrs. Darling had been diagnosed with thyroiditis on July 9, 1991 by Dr. Tracy, but that the insurance application stated that she had never suffered from any disease of the thyroid. In fact, Dr. Tracy's notes reveal, at most, a differential

we agree with the district court's conclusion that no genuine factual dispute exists as to the Darlings' material misrepresentations about Mrs. Darling's history of chest pain and Mrs. Darling's treatment for dyspnea. The remaining factual disputes about many of Mrs. Darling's alleged misrepresentations are therefore irrelevant and do not preclude summary judgment because the latter two misrepresentations (and Mr. Darling's misrepresentation) justified Savers Life's rescission of the policy.

The record indisputably reveals that Mrs. Darling experienced chest pain while walking on the beach on March 4, 1992; that she was seen by her physician, Dr. Tracy, that very day; and that Dr. Tracy diagnosed Mrs. Darling with chest pain of undetermined origin. See J.A. at 75 (stating Dr. Tracy's assessment as "chest pain cause undetermined (poss. reflux, etc.)"). Moreover, uncontradicted evidence in the record confirms that this chest pain -- which occurred less than two years before the application date -- was material to Savers Life's assessment of the risk of insuring Mrs. Darling. Gullett testified that "[p]ursuant to the underwriting guidelines utilized by Savers Life, the Certificate would not

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diagnosis of thyroiditis that he would attempt to confirm through further testing. See J.A. at 74 (stating Dr. Tracy's assessment as "Thyroiditis/hyper[thyroid] state?"). Dr. Tracy's notes also appear to indicate that Mrs. Darling's symptoms might be explained by "mono." See id. Whether Mrs. Darling was ever definitively diagnosed with thyroiditis would thus be a jury question. Similarly, a factual issue exists as to whether the Darlings failed to disclose Mrs. Darling's history of caesarian sections, ovarian cysts, and gallbladder surgery. Mrs. Darling testified in her deposition that she corrected any inaccuracies in her husband's answers to the relevant application questions about each of these conditions during her phone interview with Savers Life representative Norma Long. See Excerpts from the Deposition of Rhonda Darling, A.T.B. at 145-47. Whether Rhonda Darling in fact provided the required information in the telephone interview, thus correcting the inaccurate answers in the application, would be a jury question. Additionally, whether Mrs. Darling's diarrhea and rectal bleeding constitute "diseases" that the Darlings should have disclosed on their application would be a jury question as well.

have been issued had this treatment and diagnosis been disclosed." Id. at 83-84. Indeed, the Health Underwriters' Guide, cautions that "[a]ny chest pain which prompts a medical consultation is of Underwriting Significance. Approach carefully . . . ." Id. at 100. The guidelines also indicate that"chest pain due to heart disease" is an unacceptable risk, that "chest pain due to other cause" requires a rider, and that "chest pain, cause not found" should be referred to the medical director -- presumably, for further evaluation of the risk.[5] Id. at 100. Although the Darlings' counsel attempted, at oral argument, to characterize Mrs. Darling's chest pain simply as indigestion (based on the doctor's note that one possible explanation was reflux syndrome), he conceded that if Mrs. Darling's history had been disclosed, Savers Life would not have dealt with the risk simply by issuing a rider (which alone establishes materiality), but would have referred the application to the medical director for special consideration of the risk associated with chest pain that has not been definitively diagnosed. Indeed, the Darlings' own expert, Gordon K. Rose, testified in his deposition that "[i]f an applicant for health insurance present[ed] with a history nine months prior to the application of chest pain of undetermined cause" he would consider that history both "material" and "serious."[6] Id. at 91.

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[5] The underwriting guidelines contained in the Appellants' Attachment to Brief indicate that angina pectoris ("pain in chest usually associated with heart or circulatory disease") requires a rider if more than two years have elapsed since diagnosis and requires refusal of the application if within two years of diagnosis. A.T.B. at 2.

[6] Admittedly, the chest pain at issue occurred nineteen months, rather than nine months, before the application date, but Rose's frank admission nevertheless underscores the significance that underwriters attach to undiagnosed chest pain.

Additionally, the Darlings also have raised no factual dispute that would contravene the district court's finding that the failure to disclose Mrs. Darling's history of dyspnea (difficulty breathing) was a material misrepresentation. Because Mrs. Darling had suffered from a number of conditions about which the application specifically inquired, Question 16 of the application required her to enumerate and "give full details" about "any other ailments about which any Doctor was consulted IN THE LAST 10-YEARS." Id. at 69. Thus, if Mrs. Darling consulted with her doctor about dyspnea, she was obligated to disclose that fact to Savers Life.

Mrs. Darling's medical records reveal that, on at least one occasion, she consulted with Dr. Tracy because she was having difficulty breathing. See id. at 75 (listing Mrs. Darling's subjective complaint as, inter alia, "dyspnea"). Gullett indicated that Mrs. Darling's dyspnea was material to the risk assumed by Savers Life in underwriting the Certificate and also concluded that the Certificate would not have been issued if full disclosure of this condition had been made. See id. at 83. The underwriting guidelines in the record confirm that dyspnea of unknown origin is usually an unacceptable risk and that dyspnea with an identified cause requires a rider. See id. at 97. Appellants attempt to explain away Mrs. Darling's dyspnea by dismissing it merely as Mrs. Darling's subjective complaint, which Dr. Tracy diagnosed as "spastic colon." However, even if Dr. Tracy's diagnosis of "spastic colon" accounted for Mrs. Darling's breathing difficulties (rather than the other symptoms she apparently complained of that day), that means only that the cause of the dyspnea was identified and that a rider -- rather than rejection of the application -- was required. As discussed above, the requirement of a rider for a condition not disclosed confirms, rather than rebuts, a finding that that

condition would be material to the insurance company's assumption of the risk.[7]

As the foregoing demonstrates, the Darlings materially misrepresented their medical histories in their application for Savers Life insurance. Savers Life was therefore entitled, both by contractual language and by South Carolina Code Annotated § 38-71-40, to rescind its contract with the Darlings. Accordingly, the judgment of the district court is affirmed.

AFFIRMED

[7] Dr. Tracy apparently diagnosed"URI pleuritis (diaphragmatic)" as well as "spastic colon," J.A. at 75, and the underwriting guidelines the Darlings present in their Attachment to Brief specifically state that pleuritis (or pleurisy) requires a rider if, as with Mrs. Darling, it occurs within two years of the application date, see A.T.B. at 14.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

STEPHEN E. DARLING; RHONDA RENE DARLING,
Plaintiffs - Appellants,

v.

SAVERS LIFE INSURANCE COMPANY,
Defendant - Appellee,

and

AMERICAN HEALTH UNDERWRITERS,
INCORPORATED,

Defendant.

No. 97-1429
CA-94-2452-2-23

Filed: January 12, 1998
Entered: January 12, 1998

ORDER

Appellants have filed a petition for rehearing.

The Court denies the petition for rehearing.

For the Court,

/s/_____
Patrica S. Connor
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

STEPHEN DARLING AND RHONDA RENE DARLING,	)
Plaintiffs,	)
vs.	)
SAVERS LIFE INSURANCE CO.,	)
Defendant.	)

C/A NO. 2:94-2452-23

Filed : January 21, 1997
Entered: January 21, 1997

ORDER

This matter is before the court on motion of defendant, Savers Life Insurance Co., for summary judgment. This action was instituted in the Court of Common Pleas for Charleston County, but removed to this Court by the Defendant on September 13, 1994, on the basis of diversity of citizenship and amount in controversy. This action involves an alleged breach of insurance contract and a bad faith refusal to pay benefits under that insurance contract. Based on the submitted briefs and oral arguments heard on October 3, 1996, this court grants summary judgment in favor of defendant.

I. BACKGROUND

On September 24, 1993, Michael O. Benke ("Mr. Benke"), an independent insurance salesman, met with Mr. Darling at his place of employment to discuss health insurance for Mr. Darling and his wife. Mr. Benke operated an insurance agency known as Business Management Consultants and was a sub-agent of American Health Underwriters (formerly known as Savers Health Underwriters). In accordance with South Carolina law, Benke licensed to submit applications for insurance to defendant Savers Life Insurance Company ("Savers Life") through American Health Underwriters.[1] Mr. Benke completed an Application for Insurance ("Application") with Mr. Darling for both Mr. and Mrs. Darling.

Plaintiff Rhonda Darling was not physically present during the completion of the Application, however, the record reflect that she was contacted by telephone on three separate occasions to obtain information for the Application. Mr. Darling signed the completed Application for himself, while Erica Darling (Stephen Darling' s mother) signed the Application on behalf of Rhonda Darling after obtaining authorization from Mrs. Darling to do so. The Application contained the following language:

> I hereby apply to Savers Life Insurance Company for a certificate to be issued solely and entirely in reliance on the written answers to the questions on this Application. I understand and agree that (1) the insurance

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[1] For purposes of this motion, the court need not decide for whom Benke serves as legal agent. However, the court is mindful that an "insurance broker is primarily the agent of the person first employing him, and thus where he is employed to procure insurance, he is the agent of the insured." Allstate Ins. Co. v. Smoak, 182 S.E.2d 749 (S.C. 1971). Under the present circumstances, it appears that Mr. Benke would be the legal agent of plaintiffs.

> shall not take effect unless the Application has been accepted and approved by the Company and until the effective date of the Certificate and (2) the agent does not have the authority to waive a complete answer as to any questions in the Application, pass on insurability, make or alter any contract, or waive any of the Company's other rights or requirements. I understand and agree that the falsity of any answer or statement in this Application may bar the right to recover thereunder if such answer materially affects the acceptance of the risk or hazard assumed by the Company. The Company may rely upon this application and all the information contained herein . . . .

(Emphasis added). The completed Application was submitted to Savers Life.

On or about October 2, 1993, Norma Long of Savers Life initiated a standard telephone interview with Mrs. Darling to follow up on the information contained in the Application.

Based on the information provided in the Application and during the telephone interview, Savers Life issued a Certificate of Insurance ("Certificate") to the Darlings, effective October 8, 1993. The Application was attached to and made a part of the Certificate. The Certificate reads as follows:

> Please read the copy of the Application attached to this Certificate. Carefully check the Application to be sure all information is correct. If you find errors or if any past medical history has been left out of the Application, contact us at 8064 North Point Boulevard, Winston-Salem, North Carolina

> 27106, immediately. This Application is part of the Certificate, and the Certificate was issued on the basis that the answers to all questions and the information shown on the Application was correct and complete.

(Emphasis added).

In conjunction with subsequent claims received by Savers Life from plaintiffs' medical providers, Savers Life also contained certain historical medical records for the Darlings. These records revealed medical histories different from the information provided by the Darlings in the Application and during the telephone interview. Subsequently, Savers Life notified the Darlings that, had an accurate, complete and truthful medical history been provided with the Application, the Darlings would not have qualified for coverage. As a result, Savers Life refunded the Darlings' premium and declared the Certificate void ab initio. This lawsuit followed.

II. SUMMARY JUDGEMENT STANDARD

To grant a motion for summary judgment, this court must find that "there is not genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The judge is not to weight the evidence, but rather to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc.,477 U.S. 242, 249 (1986). If no material factual disputes remain, then summary judgement should be granted against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party bears the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). All evidence should be viewed in the light most favorable to the nonmoving party. Perini Corp. v. Perini Constr., Inc., 915 F.2d 121, 123-24 (4th Cir. 1990). "[W]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party,

disposition by summary judgment is appropriate." Teamsters Joint Council No. 83 v. Centra, Inc., 947 F.2d 115, 119 (4th Cir. 1991). "[T]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex, 477 U.S. at 322. Finally, the "obligation of the nonmoving party bears the burden of proof.'" Hughes v. Bedsole, 48 F.3d 1376, 1381 (4th Cir. 1995) (quoting Pachaly v. City of Lynchburg, 897 F.2d 723, 725 (4th Cir. 1990)), cert. denied, 116 S. Ct. 190 (1995).

III. ANALYSIS

South Carolina statutory laws bars the right to recover insurance proceeds when an insurance application contains any false statement which materially affects the acceptance of the risk. S.C. Code Ann. § 38-71-40 (Law. Co-op. Supp. 1995).[2] Additionally, long standing South Carolina contract law provides that insurers may void policies that are procured by material misrepresentation. See, e.g., Carroll v. Jackson National Life Ins. Co., 414 S.E.2d 777 (S.C. 1992); Cain v. United Ins. Co., 102 S.E.2d 360 (S.C. 1958); Reese v. Woodmen of the World Life Ins. Society, 69 S.E.2d 919 (S.C. 1952); Robinson v. Pilgrim Health & Life Ins. Co., 57 S.E.2d 60 (S.C. 1949); and McLester v. Metropolitan Life Ins. Co., 179 S.E. 490 (S.C. 1935). Savers Life argues that it is entitled to judgment as a matter of law under either theory, and, this court agrees.

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[2] S.C. Code Ann. § 38-71-40 states: "The falsity of any statement in the application for any policy covered by this chapter does not bar the right to recovery thereunder unless the false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer." (Emphasis supplied.)

A. SAVERS LIFE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW PURSUANT TO S.C. CODE ANN. § 38-71-40

Under the pertinent statute, plaintiffs have no right to recover insurance proceeds if a false statement on their application was made with actual intent to deceive; or materially affected the acceptance of the risk; or materially affected the hazard assumed by the insurer. S.C. Code Ann. § 38-71-40 (1976 and Supp. 1995).[3] The record before this court indicates that the Darlings' Application contains false statements which materially affected Savers Life's acceptance of the risk. It is also apparent to the court that the plaintiffs' false statements were made with the intent to deceive.

1. The Darlings' Application Contains False Statements.

The record in this matter establishes that plaintiffs failed to disclose information concerning their prior medical histories and current medical conditions.[4] Accordingly, the

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[3] The court notes that, even in the absence of the statute, plaintiffs contracted with Savers Life so that false statements on the Application could bar the right to recover. Paragraph 18 of the Application provides: "I understand and agree that the falsity of any answer or statement in this application may bar the right to recover thereunder if such answer materially affects the acceptance of the risk or hazard assumed by the Company."

[4] When plaintiffs' medical history is compared to the responses to the questions on the Application, many inaccuracies become apparent:

> 1. The Application indicates that neither Mr. nor Mrs. Darling suffered from any neck, back, spine or hip disease or disorder (Question 9(o)). The medical history reveals that Mr. Darling was diagnosed with a bulging cervical disk on August 26, 1993, and received

only reasonable interpretation of this evidence is that the Darlings' Application contains false statements, which this court finds as a matter of law.

2. The False Statements on the Application Materially Affected Savers Life's Acceptance of the Risk.

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physical therapy for this condition as late as September 10, 1993.

2. The Application indicates that neither Mr. nor Mrs. Darling had ever suffered from any disease of the thyroid (Question 9(n)). The medical history reveals that Mrs. Darling was diagnosed with thyroiditis on July 9, 1991.

3. The Application indicates that neither Mr. nor Mrs. Darling ever received treatment for dyspnea (Question 16). The medical history of Mrs. Darling establishes that she was treated for dyspnea in December 1988, January 1992, and March 1992.

4. The Application indicates that neither Mr. nor Mrs. Darling had ever suffered from chest pains (Questions 9(b)) or anxiety (Question 9(s)). The medical history reveals that Mrs. Darling had been treated for chest pains on two occasions and anxiety on two occasions.

5. The Application indicates that Mrs. Darling never had any disease or disorder of her reproductive organs (Question 10(b)) and never had a caesarian section (Question 10(f)). Mrs. Darling's medical history reveals history of ovarian cysts and three caesarian sections.

6. The Application indicates that neither Mr. nor Mrs. Darling had ever suffered from any disease of the gall bladder (question 9(j)). Mrs. Darling's medical history reveals that she had surgery for the removal of her gall bladder.

7. The Application indicates that neither Mr. nor Mrs. Darling had ever suffered from any disease of the rectum, esophagus, or intestines (Question 9(j) and 9 (h)). The medical history reveals that Mrs. Darling had been treated for diarrhea and rectal bleeding and had undergone a colonoscopy.

"[A] representation is material when reasonably careful and intelligent men would regard the fact involved as substantially increasing the chances of the loss insured against; and that this is especially true when the insurer, on becoming aware of the fact, would raise the rates or reject the risk altogether." Atlantic Life Ins. Co. v. Hoefer, 66 F.2d 464, 466 (4th Cir. 1933). Further, "[a] representation is material when the insured knows or has reason to believe that it will likely affect the decision of the insurance company as to the making of the contract of insurance or as to its terms." Southern Farm Bureau Casualty Ins. Co. v. Ausborn, 155 S.E.2d 902, 908 (S.C. 1967). Plaintiffs' expert testified in deposition that the Darlings' undisclosed prior medical history is material to an underwriter's evaluation of risk. This expert also testified that each ailment is singularly material to the decision of an underwriter to accept or deny an application.

Furthermore, according to the affidavit of Thomas E. Gullett, Director of Major Medical and Chief Underwriter for Savers Life, plaintiffs' medical history renders them uninsurable pursuant to Savers Life's underwriting guidelines. This evidence is uncontradicted. Mr. Gullett is responsible for all decision to accept or deny health insurance applications to Savers Life. Mr. Gullett personally made the decision to issue the Certificate to the Darlings in this instance. Therefore, this court finds that the Certificate was issued as a consequence of the false statements on the Application.

Plaintiffs, in response to defendant's misrepresentation assertions, argue that the inaccuracies on the Application should be excused because Mr. Benke allegedly inserted answers on the application without plaintiffs' knowledge and because Mr. Darling, who originally answered the questions, did not know all of his new wife's medical history. This court finds both of these arguments unpersuasive because plaintiffs signed (or in the case of Mrs. Darling, authorized the signing of) the insurance

application. A party to a contract cannot avoid the effect of the document by claiming that he did not read it, and insurance contracts are no different. Sims v. Tyler, 281 S.E.2d 229 (S.C. 1981).

In Parnell v. United American Ins. Co., 142 S.E.2d 204 (S.C. 1965), the South Carolina Supreme Court affirmed a defendant insurance company's judgment notwithstanding the verdict on nearly identical facts. There, plaintiff alleged that the insurance company's agent inserted false answers in her application without her knowledge. Plaintiff signed the application without reading it. Parnell, 142 S.E.2d at 206. The insurance company delivered the policy, with the application attached, to the plaintiff a few weeks later. However, plaintiff did not read the policy or the application for five months. Parnell, 142 S.E.2d at 206. When the insurer learned the true state of plaintiff's health, it rescinded the policy, writing to the plaintiff, "[T]here were misstatements on the application which were material to your acceptance as a risk . . . ." Id. After reviewing these facts, the court stated:

> We have consistently followed the rule that ordinarily one cannot complain of fraud in the misrepresentation of the contents of a written instrument signed by him when the truth could have been ascertained by reading the instrument, and that one entering into a written contract should read and avail himself of every reasonable opportunity to understand its content and meaning. This rule has been applied to applications for contracts of insurance.

Id. (citations omitted). The court further observed: "had [plaintiff] read the application she would have readily known that it contained false answers." Parnell, 142 S.E.2d at 208. By failing to review her application, "[plaintiff] was guilty of

reckless disregard of her duty." Parnell, 142 S.E.2d at 209.; see also, O'Connor v. Brotherhood of Railroad Trainman, 60 S.E.2d 884 (S.C. 1950) (insurance carrier was entitled to rescind policy because of false application, notwithstanding the fact that the application had been filled out by soliciting agent, due to the gross negligence of plaintiff in signing application for insurance without knowing its contents and without considering the effect it would have upon his rights).

Accordingly, plaintiffs cannot blame Mr. Benke for the false statements in their Application as plaintiffs breached their contractual and common law duties to review the Application and immediately report inaccuracies. When the plaintiffs signed (or in the case of Mrs. Darling, authorized the signing of) the insurance application containing false statements, they adopted those statements as their own. Floyd v. Ohio General Ins. Co., 701 F.Supp. 1177, 1188 (D.S.C. 1988) (citing Pittman v. First Protection Life Ins. Co., 325 S.E.2d 287 (N.C. App. Ct. 1985)).

3. The False Statements on the Application Were Made with Actual Intent to Deceive.

Under South Carolina law, an intent to deceive may be inferred when there is no other reasonable or plausible explanation for an applicant's false statements. Floyd, 701 F. Supp. at 1190. When the evidence leads reasonable persons to infer an intent to deceive, the South Carolina Supreme Court has not hesitated to sustain directed verdicts for the insurer and enter judgment for insurers, on the basis that the applicant misrepresented the state of his health. See, e.g., Arnold v. Life Ins. Co. of Georgia, 83 S.E.2d 553 (S.C. 1954); Johnson v. New York Life Ins. Co., 164 S.E. 175 (S.C. 1932). Intent may be shown by the applicant's express words, or it may be deduced from his acts and the facts and circumstances surrounding the making of the misrepresentations. Johnson, 164 S.E. at 177.

In Phillips v. Life & Casualty Co. of Tennessee, 85 S.E.2d 197 (S.C. 1954), the court was presented only circumstantial evidence of intent. The insured was the plaintiff's infant daughter. On the application, the insured's father stated that the infant was in good health at the time of the application, and had never had any surgical operation, serious illness or accident. When the infant died following a convulsion, the insurer asserted that false statements, material to the risk, were made in the application with the intent to deceive the company. Phillips, 85 S.E.2d at 198.

Undisputed testimony at trial revealed that the infant had suffered from convulsions on five separate occasions, had been hospitalized twice, and had been treated in a physician's office twice, the last time approximately three months before the application was made. Phillips, 85 S.E.2d at 199. In reviewing the evidence of intent to deceive, the court observed that "[t]hese illnesses were not of a trivial nature. The inquiries mentioned above did not relate to matters of opinion or to matters to which there was a possibility of mistake." Phillips, 85 S.E.2d at 199. Evidence in that record indicated the applicant canceled a separate policy on the infant once the subject policy was issued, evidence which the court acknowledged as the applicant's good faith. However, the court held that good faith alone was not sufficient evidence to require submission of the intent issue to the jury. Phillips, 85 S.E.2d at 200. The court reversed the jury's verdict and entered judgment for the insurer.

In the case at bar, the amount of medical history withheld from Savers Life, when viewed in light of the Darlings' multiple opportunities to disclose the information, and in light of the Darlings' duty to disclose, gives rise to only one reasonable inference, that the Darlings intended to deceive Savers Life.

B. SAVERS LIFE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW PURSUANT TO THE LAW OF MATERIAL MISREPRESENTATION

> Under South Carolina law, an insurer may avoid coverage under an insurance policy when it establishes that: (1) the insured made a false statement in the insurance application; (2) that the insured knew was false when made; (3) that was material to the risk covered in the policy; (4) that the insurer relied on; and (5) that was made with the intent to deceive. Gasque v. Voyager Life Insurance Company of South Carolina, 288 S.C. 629, 344 S.E.2d 182, 184 ((1986); Strickland v. Prudential Insurance Company of America, 278 S.C. 82, 292 S.E.2d 301, 304 (1982); United Insurance Company of America v. Stanley, 277 S.C. 463, 289 S.E.2d 407, 408 (1982).

Floyd, 701 F. Supp. at 1188. The first, third and fifth elements were discussed in the previous section. As to the second element (knowledge of falsity), there can be no doubt that Mr. Darling knew when he made the representations in the insurance application that some were not true. "The facts [plaintiffs] concealed were within [their] personal knowledge . . . and could hardly have escaped [their] attention in answering the questions propounded." Phillips, 85 S.E. 2d at 199. Furthermore, in signing that application they certified the truthfulness of the answers.

As to the fourth element (reliance), the previously discussed affidavit of Mr. Gullette states that a Certificate could not have been issued if the Darlings had provided full disclosure. The South Carolina Supreme Court stated with respect to an insurer's reliance on an applicant's representations:

> Representations in an application for a policy of liability insurance should not only be true but full. The insurer has the right to know the whole truth. If a true disclosure is made, it is put on guard to make its own inquiries and determine whether or not the risk should be assumed. A misstatement of material facts by the applicant takes away the opportunity to estimate the risk under its contract. (Citation omitted). Where a fact is specifically inquired about, or a question so framed as to elicit a desired fact, a full disclosure must be made, and the insurer has the right to rely upon the answer. An applicant is required to make full answers without evasion, suppression, misrepresentation or concealment of material facts so that such statement will represent his knowledge of the hazards of loss. (Citation omitted). If an applicant undertakes to state the circumstances which can affect the risk, he must do so fully and faithfully.

Government Employees Insurance Co. v. Chavis, 176 S.E.2d 131, 133-134 (S.C. 970). Accordingly, this court is of the opinion that Savers Life relied on the Darlings' false statements. Therefore, the policy is void pursuant to the common law of material misrepresentation.

IV. CONCLUSION

It is, therefore,

ORDERED, for the reasons articulated above, that Defendant's Motion for Summary Judgment be **GRANTED.**

AND IT IS SO ORDERED.

/s/_____
PATRICK MICHAEL DUFFY
United States District Judge

Charleston, South Carolina
January 21, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

STEPHEN DARLING AND)
RHONDA RENE DARLING,)
Plaintiff,)
)
-vs-)
)
SAVERS LIFE INSURANCE CO.,)
AMERICAN HEALTH UNDERWRITERS,)
INC., f/k/a/ SAVERS HEALTH)
UNDERWRITERS, INC.,)
Defendants.)

Civil Action No. 2:94-2452-23

Filed: March 11, 1997
Entered: March 11, 1997

PLAINTIFF'S MOTION
FOR RECONSIDERATION

DENIED

/s/ _____ 3/11/97
Patrick Michael Duffy Date
United States District Judge

TO: JOHN L. MALESOVAS, ESQUIRE,
THOMAS H. MILLIGAN, ESQUIRE,
AND DANNY H. MULLIS, ESQUIRE,
ATTORNEYS FOR DEFENDANTS:

No. 97-1692

(2)

Supreme Court, U.S.
FILED
MAY 15 1998
CLERK

In The
Supreme Court of the United States

October Term 1997

STEPHEN E. DARLING;
RHONDA RENE DARLING,
Petitioners,

v.

SAVERS LIFE INSURANCE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals correctly affirm the District Court's grant of Summary Judgment where the Petitioners materially misrepresented their medical histories on an insurance application in breach of the insurance contract and in violation of S.C. Code Ann. § 38-71-40?

LIST OF PARENT COMPANIES AND NON-WHOLLY OWNED SUBSIDIARIES

The following is the parent company of the Respondent, Savers Life Insurance Company: Standard Management Corporation. There are no non-wholly owned subsidiaries.

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JURISDICTION

Jurisdiction of the Federal Court was based on diversity of the Parties pursuant to 28 U.S.C. 1332. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

On or about September 24, 1993, Michael O. Benke, an independent insurance agent, at the request of Stephen Darling's mother, met with Stephen Darling at his place of employment to discuss health insurance for the Petitioners, Stephen and Rhonda Darling ("the Darlings"). Benke operated an insurance agency known as Business Management Consultants and was a sub-agent of American Health Underwriters (formerly Savers Health Underwriters). American Health Underwriters is not corporately related to Respondent, Savers Life Insurance Company ("Savers Life"). In accordance with South Carolina law, Benke was licensed to submit applications for insurance to Savers Life through American Health Underwriters. Benke was also authorized to submit applications for insurance for up to twenty-five other different companies. He was not an employee of Savers Life. He acted for and on behalf of the Darlings and as legal agent for the Darlings in submitting an application for insurance to Savers Life.[1]

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[1] The Court of Appeals noted: "The District Court did not decide whether the insurance salesman, Benke, served as the legal agent of the Darlings or of Savers Life, although the Court noted that, under the applicable legal standard,

During Benke's meeting with Stephen Darling, Benke completed the Application for insurance and reviewed the Savers Life coverage. Mrs. Darling was not present during the completion of the Application; however, she was contacted by telephone on three separate occasions to obtain information for the Application. Stephen Darling signed the Application for himself. Stephen Darling's mother, Erica Darling, signed the Application on behalf of Rhonda Darling after obtaining authorization from Rhonda Darling to do so. The application contained the following language:

> I hereby apply to Savers Life Insurance Company for a Certificate to be issued solely and entirely in reliance on the written answers to the questions on this Application ... I understand and agree that the falsity of any answer or statement in this Application may bar the right to recover thereunder if such answer materially affects the acceptance of the risk or hazard assumed by the

---

Benke appeared to be the legal agent of the Darlings... It was not necessary to resolve this agency question because even if Mr. Benke was acting as an agent of Savers Life, the fact would not obviate the Darlings' responsibility for any misrepresentations in the application. *See Parnell v. United Insurance Co.*, 142 S.E.2d 204 (S.C. 1965) (allowing insurer to rescind the policy based on material misstatements in the plaintiff's application, even though the plaintiff alleged that the insurance company's agent had inserted false answers in her application without her knowledge and that she had signed the application without reading it)."

> Company. The Company may rely upon this Application and all the information contained herein....

On or about October 2, 1993, Norma Long, a Savers Life employee, conducted a telephone interview with Rhonda Darling to follow up on the information contained in the Application. Savers Life also obtained medical records for the physicians identified by the Darlings on the Application as their treating physicians. Based upon the information provided in the Application, during the telephone interview with Rhonda Darling and from the medical records received, Savers Life issued a Certificate of Insurance to the Darlings, effective October 8, 1993. The Application was attached to, and made a part of, the Certificate. The Certificate states:

> Please read the copy of the Application attached to this Certificate. Carefully check the Application to be sure all information is correct. If you find errors or if any past medical history has been left out of the application, contact us at 8064 North Point Boulevard, Winston-Salem, NC 27106, immediately. This Application is part of the Certificate, and the Certificate was issued on the basis that the answers to all questions and the information shown in the Application were correct and complete.

The Darlings did not report any inaccuracies in the information on the Application.

Within the period of contestability, and in conjunction with subsequent claims submitted to Savers Life by the Darlings' medical providers, Savers Life obtained certain historical medical records for the Darlings from physicians not previously identified on the Application. Savers Life discovered that the information in those medical records differed from that provided by the Darlings in their Application and during the telephone interview, and determined that the Darlings would not have qualified for coverage if they had provided accurate, complete medical histories to Savers Life. Relying on the contractual language of the Application that allowed Savers Life to void the policy for material misrepresentations by the Insureds and relying on South Carolina Code Ann. § 38-71-40[2], Savers Life refunded the Darlings' premium and declared the Certificate void *ab initio*.

Savers Life rescinded its contract with the Darlings based upon their failure to disclose a number of material health problems including: Mr. Darling's bulging cervical disk, recent back injury and treatment for a past neck injury and Mrs. Darling's history of chest pain, treatment for

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[2] South Carolina Code Ann. § 38-71-40 provides: "The falsity of any statement in the application for any policy covered by this chapter does not bar the right to recovery thereunder unless the false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the insurer."

dyspnea, treatment for anxiety, prior dizziness, blurred vision and migraine headaches.[3]

Thomas E. Gullett, Director of Major Medical and Chief Underwriter for Savers Life, testified that these misrepresentations were material to Savers Life's assumption of the risk of insuring the Darlings. Likewise, Gordon Rose, the Darlings' own expert, testified that certain of these non-disclosures were material to the risk undertaken by Savers Life.

SUMMARY OF THE ARGUMENT

The Darlings' materially misrepresented their medical histories in their application to Savers Life. Such misrepresentations were material to the risk accepted by Savers Life. Under the contractual language of the Savers Life Application and Certificate, and under South Carolina Code Ann. § 38-71-40, Savers Life was entitled to rescind its contract with the Darlings.

A Writ of Certiorari will be granted only for compelling reasons. Petitioners have advanced no reason of the character considered by this Court in exercising its discretion pursuant to Rule 10 of the Rules of the Supreme Court of the United States.

Savers Life was entitled to judgment as a matter of law. Thus, the Petition for Writ of Certiorari should be denied.

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[3] Savers Life also considered other non-disclosed health problems; however, the Fourth Circuit Court of Appeals determined there may be issues of fact regarding Mrs. Darling's thyroid treatment, ovarian cysts and rectal bleeding. Petitioners' App. at 11 – 12.

ARGUMENT

I. SAVERS LIFE WAS ENTITLED, UNDER BOTH SOUTH CAROLINA CODE ANN. § 38-71-40 AND CONTRACTUAL LANGUAGE, TO RESCIND ITS CONTRACT WITH THE DARLINGS AND TO JUDGMENT AS A MATTER OF LAW.

The Darlings' material misrepresentations regarding their medical histories were sufficient grounds for Savers Life to rescind its contract with the Darlings under South Carolina Code Ann. § 38-71-40. The Code provides:

> The falsity of any statement in the application for any policy covered by this chapter does not bar the right to recovery thereunder unless the false statement was made with actual intent to deceive or unless it materially affected either the acceptance of the risk or the hazard assumed by the Insurer.

South Carolina Code Ann. § 38-71-40. In addition, the Darlings' insurance Application states that they "agree that the falsity of any answer or statement in this Application may bar the right to recover thereunder if such answer materially affects the acceptance of the risk or hazard assumed by the Company."

Savers Life issued a Certificate of Insurance to the Darlings, effective October 8, 1993. The

Application was attached to, and made part of, the Certificate. The Certificate states:

> Please read the copy of the Application attached to this Certificate. Carefully check the Application to be sure all information is correct. If you find errors or if any past medical history has been left out of the Application, contact us at 8064 North Point Boulevard, Winston-Salem, North Carolina 27106 immediately. This Application is part of the Certificate, and this Certificate was issued on the basis that the answers to all questions and the information shown on the Application was correct and complete.

Where the Darlings breached their common law and contractual duties, Savers Life justifiably rescinded the Darlings' policy.

The District Court found numerous inaccuracies in the information the Darlings provided Savers Life. The Court of Appeals disagreed with the District Court's implicit finding that there were no disputed factual issues about all of the alleged misrepresentations. Petitioners' App. at 11. However, the Court of Appeals found that there were no genuine disputes as to the Darlings' material misrepresentations about Mr. Darling's bulging cervical disk, Mrs. Darling's history of chest pain, and Mrs. Darling's treatment of dyspnea. Petitioners' App. at 12. The Court of Appeals determined such

misrepresentations sufficient for Savers Life to rescind its contract. Petitioners' App. at 12. These misrepresentations were sufficient because they were undisputed, undisclosed and clearly material to Savers Life's assumption of the risk of insuring the Darlings.

Petitioners suggest that Savers Life's rescission of the policy is really two distinct cases. Petitioners' Brief at 8-9. According to the Petitioners, Mr. Darling's misrepresentations were irrelevant as to whether Mrs. Darling was entitled to continuing coverage from Savers Life. Petitioners' Brief at 8. They support this argument by asking generally if, under Savers Life's underwriting requirements, Savers Life could disqualify one family member and insure the rest of the family. Mr. Gullett answered "yes." He added that "[Savers Life] could disqualify one spouse and insure another spouse." Petitioners argue that Rhonda and Stephen Darling's insurability was not contingent on each other based on Mr. Gullett's general statements. Petitioners' Brief at 8 – 9. However, the record clearly shows neither Mr. Darling nor Mrs. Darling would qualify individually. Additionally, the Court of Appeals found that the Darlings completed only <u>one</u> insurance Application, were issued only <u>one</u> insurance certificate, and entered into only <u>one</u> contract with Savers Life. Petitioners' App. at 9. (*emphasis added).* Furthermore, Mr. and Mrs. Darling were jointly, rather than separately, insured by Savers Life and their respective coverage under this one policy was derivative of each other's coverage. Petitioners' App. at 9 - 10. The Court of Appeals

concluded that it was "very unlikely that the South Carolina Supreme Court would hold that Mr. Darling's coverage was severable from Mrs. Darling's coverage and thus that Mr. Darling's misrepresentation would not void Mrs. Darling's coverage. Petitioners' App. at 11.

Petitioners have also argued that Mississippi law should be followed to prevent Mrs. Darling from being banned by any misrepresentations in the telephone interview because the telephone questionnaire was not attached to the policy. Petitioners' Brief at 9. Mississippi law has neither a binding effect, nor should it have a persuasive effect on the South Carolina Supreme Court, this Court or the outcome of this case. Moreover, Petitioners disingenuously argue that the existence of any factual dispute with regard to Mrs. Darling's medical history is sufficient to take this case before a jury. The District Court and the Court of Appeals found no genuine factual dispute existing as to the Darlings' material misrepresentations about Mr. Darling's bulging cervical disk, Mrs. Darling's history of chest pains and her treatment for dyspnea. Whatever factual disputes may remain regarding the Darlings' medical history are irrelevant because *any material misrepresentation* justified Savers Life's rescission of the policy according to the contractual agreement between the Darlings and Savers Life and South Carolina Code Ann. § 38-71-40. The Darlings' own expert, Gordon Rose, testified that "[i]f an applicant for health insurance present[ed] with a history nine months prior to the application of chest pain of undetermined cause,"

then "he would consider that history both 'material' and 'serious.'"[4] Petitioners' App. at 13. The Court of Appeals added that Mrs. Darling was obligated to disclose her prior medial treatment for dyspnea. Petitioners' App. at 14. There is no factual dispute that Mrs. Darling's failure to disclose her prior chest pain and dyspnea was a material misrepresentation and material to Savers Life's risk.

Where the Darling materially misrepresented their medical histories in their Application for Insurance, Savers Life was entitled, under both the South Carolina Code Ann. § 38-71-40 and contractual language, to rescind its contract with the Darlings. Thus, the Petition for Writ of Certiorari should be denied.

II. PETITIONERS MISREPRESENT CERTAIN FACTS IN THEIR BRIEF.

This Court should consider facts only from the record and not facts either mischaracterized or not a part of the record.

Petitioners have characterized the insurance salesman, Mr. Benke, who met with Stephen Darling regarding the application for major medical health insurance, as a "Savers Life Agent." Petitioners' Brief at 2. Neither the District Court nor the Court of Appeals decided whether Mr. Benke served as legal agent of the Darlings or Savers Life. Petitioners' App. at 6, n. 3. However, both courts affirmed that it

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[4] Mrs. Darling had a history of chest pains for nineteen months, rather than nine months, before the Application date.

appeared that Mr. Benke was the legal agent of the Darlings. Petitioners' App. at 6, n. 3. Furthermore, both courts concluded that it was not necessary to resolve this agency question because, even if Mr. Benke acted as an agent of Savers Life, this fact would not obviate the Darlings' responsibility for any misrepresentations in the Application. Petitioners' App. at 6, n. 3; *See Parnell v. United Insurance Company, 142 S.E.2d 204 (S.C. 1965).*

Petitioners also stated that Mr. Benke completed this Application in a "hasty, cursory manner" and that Mr. Benke did not stress that the Application was very important. Petitioners' Brief at 2. There is no evidence to support this claim in the record. Petitioners have asserted that "[u]nderwriting at the time claims are made has become a disturbing trend in the health insurance industry." Petitioners' Brief at 2. Such contention is argumentative and unsupported by the record. To the contrary, Savers Life completed underwriting before the policy was issued based upon information provided. Finally, Petitioners have asserted that they have almost $100,000.00 in medical bills that Savers Life has refused to pay, they have characterized their current financial position and emotional standing as ruined, they claim that they have been refused medical treatment and can not obtain health insurance, and that this situation has caused the end of their marriage and has caused them to compromise their children's health due to a lack of money and no health insurance. Petitioners' Brief at 3 – 4. There is no evidence in the record to support such outrageous and inflammatory

contentions. In fact, the Darlings' children (if any exist) were never insured under this Policy.

Where Petitioners have mischaracterized facts and can not support from the record a number of factual assertions contained in their Brief, including, but not limited to, the above examples, this Court should not consider these contentions in determining this matter before the Court.

III. UNDER THIS COURT'S JUDICIAL DISCRETION, THIS WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THERE IS NO COMPELLING REASON TO DO SO.

The District Court and the Court of Appeals based their respective decisions upon the record, South Carolina Ann. § 38-71-40, contractual language between the Darlings and Savers Life, and Fourth Circuit and South Carolina case law.

Petitioners argue that the Court of Appeals relied incorrectly on Atlantic Life Insurance Co. v. Hoefer, 66 F.2d 464, 466 (4th Cir. 1933) in determining the materiality of information given on the Application. Petitioners' Brief at 5. Atlantic held that a "representation is material when reasonably careful and intelligent men would regard the fact involved as substantially increasing the chances of the loss insured against; and that this is especially true when the insurer, on becoming aware of the fact, would raise the rates or reject the risk altogether." Id.; Petitioners' App. at 8. According to the

Petitioners, the standard by which materiality is determined should be "based on the insurance industry in general and what action a reasonable underwriter would have taken under the circumstances" as stated in Berber v. Minnesota Mutual Life Ins. Co., 38 Utah Adv. Rep 10, 723 P.2d 388 (1986). Petitioners' Brief at 5. The Court of Appeals properly looked to Atlantic Life Insurance and to Southern Farm Bureau Casualty Ins. Co. v. Ausburn, 155 S.E.2d 902, 908 (S.C. 1967) to determine the standard of materiality under South Carolina law. Petitioners' App. at 8. Southern Farm Bureau held that "a representation is material when the insured knows or has reason to believe that it will likely affect the decision of the insurance company as to the making of the contract of insurance or as to its terms." Southern Farm Bureau, 155 S.E.2d at 908. It is incredulous to assert that the State Court of last resort in South Carolina would consider or would use a standard for materiality from the law of the State of Utah in lieu of its own standard previously stated. Nonetheless, Petitioners own expert (presumably a reasonable underwriter) concedes the materiality of the non-disclosures addressed by the Court of Appeals.

Petitioners also cite King v. Ohio Valley Fire and Marine Insurance Company, 212 KY 770, 280 SW 127 (1926). Petitioners' Brief at 6. Once again, Kentucky case law has neither a binding effect nor should have a persuasive effect on the matter before this Court. Petitioners have gone so far as to assert that "case law (limited to King) does not favor the absolute reliance on the insurance carrier's employee to provide testimony

as to the materiality of the risk." Petitioners' Brief at 6.

Petitioners have also argued that the practice Savers Life used for underwriting caused an unreasonable delay and adversely affected the Petitioners, thus a jury question arises. Petitioners' Brief at 7. The Petitioners can cite no Fourth Circuit or South Carolina case to support this ludicrous contention. Petitioners' expert, Gordon Rose, testified generally that it is bad underwriting practice to underwrite at the time claims are made. However, there is no evidence that Savers Life underwrote the Darlings' claim at the time of their claim. The record is clear that Savers Life underwrote the Darlings' policy at the time the Certificate of Insurance was issued. The only thing that Savers Life did at the time subsequent claims were made was to review additional medical records from physicians not previously identified (and perhaps fraudulently hidden from Savers Life by the submission of an inaccurate Application).

This Court may grant or deny this Writ of Certiorari in its judicial discretion. Rule 10 of the Rules of the Supreme Court of the United States states that a "Petition for Writ of Certiorari will be granted only for compelling reasons." The matter before this Court does not present a "compelling reason." Petitioners have attempted to bolster their position by mischaracterizing facts, manufacturing contentions, hoping for sympathy, and creating an alleged underwriting conspiracy within the health insurance industry. The matter before the Court involves a contract between the Petitioners and Respondent to be interpreted

under South Carolina law. Petitioners can bring forth no conflicts from other United States Court of Appeals on the same matter. This matter involves neither an important federal question nor is it a federal question. Petitioners cite no unacceptable or unusual course of judicial proceedings in the courts below. Moreover, this was not a decision from the South Carolina Court of last resort regarding an important federal question. Lastly, the Court of Appeals did not decide an important question of federal law that has not been, but should be, settled by this Court. The matter is not of the character of reasons that this Court considers in granting a Writ of Certiorari.

Rule 10 further states that "[a] Petition for Writ of Certiorari is rarely granted when asserted errors consist of erroneous factual findings or a misapplication of a properly stated rule of law." Petitioners have set forth no erroneous factual findings and can only argue that judgment as a matter of law was improperly granted and affirmed in the courts below. This Court needs only to look to the material misrepresentations, contractual language between the Petitioners and the Respondents and the South Carolina Code Ann. § 38-71-40 to determine whether to grant or to deny this Writ of Certiorari. This Court should deny the Petition for Writ of Certiorari.

CONCLUSION

For the reasons stated above, the Petition should be denied.

Dated: May 12, 1998

Respectfully submitted,

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